The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

COLUMBIA RIVERKEEPER, ET AL., Plaintiffs, v. ANDREW WHEELER, ET AL.,[1] Defendants.	No. 2:17-cv-00289-RSM **UNITED STATES' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL** NOTED ON MOTION CALENDAR: November 29, 2018 (Per ECF No. 49)

Defendants Andrew R. Wheeler, Acting Administrator, and the United States Environmental Protection Agency (collectively "EPA"), file this reply in support of their Motion for Stay Pending Appeal, ECF No. 47. In that Motion, the United States seeks an order staying this Court's October 17, 2018 Order Re: Motions for Summary Judgment, ECF No. 39 ("Order"), pending any United States appeal of that Order to the United States Court of Appeals for the Ninth Circuit. As the United States has explained, the Department of Justice's Office of the Solicitor General is still determining whether to pursue an appeal in this case, so the United States has filed a protective notice of appeal. To maintain the *status quo ante* and prevent

[1] Acting EPA Administrator Andrew R. Wheeler is automatically substituted for his predecessor in office pursuant to Fed. R. Civ. P. 25(d).

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irreparable harm should its appeal be authorized to proceed, the United States respectfully requests that the Court grant its Motion. In support of that Motion, the United States responds to mischaracterizations in Plaintiffs' Opposition, *see* ECF No. 50, as follows:

1. Plaintiffs claim that EPA's Motion should be denied because it is only aimed at "further delay" and that EPA should instead "issue the temperature TMDL within the 30-day deadline set by the CWA and the Court's order, or approach[] Riverkeeper to negotiate a reasonable schedule for TMDL issuance . . . ." Opp. at 2. As the Declaration of Daniel D. Opalski explains, ECF No. 47-2 ("Opalski Dec."), EPA continues work apace on the TMDL notwithstanding its request for a stay, so this Motion is not an effort to delay that TMDL work. *Id.* ¶¶ 8, 13. Rather, it ensures that the United States is able to preserve for review any legal or factual issues that the Office of the Solicitor General – in exercise of its duties to the American public – determines warrant further review. It will also allow EPA, in the meantime, to ensure that any TMDL issued accords with the appropriate TMDL processes, including time for public comment and coordination of implementation measures.[2] Opalski Dec. ¶¶ 12, 14-16.

2. Plaintiffs mischaracterize the state of the law in claiming that this case does not, at a minimum, raise "serious and difficult question of law." *See* Opp. at 3-4. To begin, Plaintiffs ignore that *no circuit court* has ever allowed a single TMDL to give rise to a constructive submission. *See S.F. Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002) (constructive

[2] Plaintiffs suggest that EPA could have avoided the need for its Motion by approaching them to "negotiate a reasonable schedule." This is entirely misplaced. Whether a party is entitled to a stay does not turn on whether that party might avoid harm through some purely speculative settlement. In any case, as the United States has explained, *see* ECF No. 40, it could not pursue any such settlement in advance of its Motion because its internal review process to authorize an appeal, or other next steps, is not yet complete. The United States sought a brief delay of the Court's Order to allow that internal process to conclude before compliance with the Order's deadlines became imminent and necessitated this filing, but that request – *which Plaintiffs opposed* – was denied. *See* ECF No. 44.

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submission inapplicable because California had submitted some TMDLs); *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001) (constructive submission inapplicable because Ohio had submitted some TMDLs); *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984) (remanding and explaining that there would be no constructive submission if "the states are, or will soon be, in the process of submitting TMDL proposals or [if] some other factor . . . has made TMDL submissions impracticable"). Plaintiffs further ignore that – excepting this case, and the district court opinion in *Ohio Valley Environmental Coalition v. McCarthy*, which was recently overturned by the Fourth Circuit – only one court has ever actually "applied the [constructive submission] doctrine to force EPA action," and did so only where it was "undisputed" that the state "ha[d] not submitted a single TMDL to EPA" in over ten years, *Ohio Valley Environmental Coalition v. McCarthy*, 893 F.3d 225, 230 (4th Cir. 2018) (describing and quoting *Alaska Ctr. for the Envt. v. Reilly*, 762 F. Supp. 1422, 1425 (W.D. Wash. 1991)). Plaintiffs also incorrectly claim that "[w]hen this Court issued its Order on summary judgment, it followed [] precedent" set by *Sierra Club v. McLerran*, *Las Virgenes Municipal Water District v. McCarthy*, and *Ohio Valley*. *See* Opp at 4. These cases were not precedent for this Court and will not be precedent for the Ninth Circuit. First, as district court opinions, they have only persuasive value. More importantly, they do not represent settled law. The *McLerran* court's discussion of the theoretical reach of the constructive submission theory was *dicta*. *See* No. 11-1759, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015). The *Las Virgenes* case did not find a constructive submission, and only upheld a consent decree in a case in which EPA did not contest that theory. *See* No. 15-0271, 2017 WL 600102 (S.D. W.Va. Feb. 14, 2017). And the *Ohio Valley* case, as Plaintiffs are well aware, was reversed on appeal to the Fourth Circuit because West Virginia "has produced at least some TMDLs" and "has a credible plan in place to produce others." 893 F.3d at 230-31.

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Notably, the Fourth Circuit explicitly refused to decide whether the constructive submission theory itself is lawful. *Id.* at 231.

3. Plaintiffs are incorrect that the Court's Order has no jurisdictional flaw because it "ordered precisely what the Clean Water Act requires." Opp. at 4. The Act only allows suit against EPA – and thus grants this Court jurisdiction – where there is "a failure of [EPA] to perform" a non-discretionary act. 33 U.S.C. § 1365(a)(2). EPA has not yet failed to comply with Section 303(d)(2)'s requirement to issue a TMDL within 30 days of its disapproval of a state submission, *see* 33 U.S.C. § 1313(d)(2), so there is no "failure" that would allow Plaintiffs to bring suit to compel issuance of the TMDL. An opinion that "does nothing more than simply restate what the CWA explicitly requires," Opp. at 5, is – at this stage – an advisory opinion and so the Order's deadline for issuing the TMDL was beyond this Court's jurisdiction. For the same reason, Plaintiffs' bald assertion that they "clearly ha[ve] standing to pursue this claim because EPA has disapproved the states' submissions," Opp. at 5 n.1, is incorrect as a matter of law. EPA had not disapproved the states' alleged constructive submissions when the Complaint was filed, *see* Order at 15, and EPA is not yet in violation of any additional duties triggered by its recent disapproval on November 16, 2018. As such, no cause of action has yet accrued, and Plaintiffs have not yet acquired standing, to sue the United States for issuance of the TMDL.

4. Plaintiffs claim it is insufficient for the United States to assert harm absent a stay because the Ninth Circuit "might" find the appeal moot. Plaintiffs go so far as to say that, "If EPA *itself* cannot decide whether its appeal would be mooted, EPA cannot demonstrate the level of certain harm required to obtain a stay." Opp. at 4-5. But EPA is not an Article III court, so it is not for EPA to decide whether its appeal will be mooted by action to issue the TMDL. Nor is Ninth Circuit precedent clear on this point and Plaintiffs themselves point to no authority to

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dispute that EPA risks mooting higher court review of the questions at issue in this case. The Court should exercise "the utmost caution" to avoid creating a "mootness Catch-22" by compelling EPA to choose between compliance with the Order and the possibility of mooting any appeal. *See Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014).

5. Plaintiffs are incorrect that the harm EPA faces absent a stay, outlined in the Opalski Declaration, Opalski Dec. ¶¶ 3-4, 12, 14-16, should be ignored because EPA could have issued this TMDL earlier and so such harm is "self-inflicted." Opp. at 6. The question before the court on a motion for stay pending appeal is whether denial of relief would create irreparable harm *now*, not whether such harm could have been prevented by taking different steps before the commencement of litigation. *See, e.g.*, *Humane Soc. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008). In any event, Plaintiffs' attempts to minimize the harm to EPA are unsupported and contrary to the statements of EPA's sworn declarant. For example, Plaintiffs claim that the typical three- to five-year schedule for completing a TMDL is not relevant here because it "ignores the years EPA spent drafting this TMDL that was nearly final in 2003," Opp. at 6, and that there is no harm in proceeding without public engagement on this TMDL because "a Draft TMDL was released for public comment more than a decade ago," *id.* at 7. Both assertions ignore the fact, attested to by EPA's declarant, that completing the present TMDL requires "significant updates to virtually all of the TMDL developmental work that EPA had conducted in the early 2000s." Opalski ¶ 8. So while EPA resumed work on the TMDL in 2017, *see* Opalski ¶¶ 8, 17, EPA is still well short of a typical three- to five-year schedule for TMDL preparation (and for a TMDL that is hardly typical). Indeed, Plaintiffs themselves imply that requiring EPA to finish the TMDL by December 17 is unreasonable, stating that instead of meeting the Court's 30-day deadline, EPA could have approached Plaintiffs about settlement to "negotiate a

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reasonable schedule for TMDL issuance . . . ." Opp. at 1 (emphasis added).

6. Riverkeeper's dual claims that (1) "[t]he balance of equities . . . tips in Riverkeeper's favor" because the TMDL will address environmental injury, Opp. at 8, and that (2) no harm attaches to EPA's inability to allow for public input or coordinate implementation of the TMDL before issuance, *id.* at 7, are contradictory. A TMDL is not self-implementing and does not, by itself, address environmental injury, *see Pronsolino v. Nastri,* 291 F.3d 1123, 1129 (9th Cir. 2002); only coordinated implementation of the TMDL through other CWA provisions and efforts by and with states, federal agencies, and other parties can begin to address an environmental harm. Opalski Dec. ¶¶ 5-6, 14, 16. So absent successful stakeholder coordination and implementation, this TMDL cannot address environmental injury. *Id.* And yet Plaintiffs also claim that denying the United States' Motion, which they do not dispute will require EPA to issue a TMDL before such coordination can take place and such implementation measures can be discussed, does not pose any irreparable harm. Opp. at 7. Plaintiffs fail entirely to acknowledge that delaying public process, coordination, and implementation discussions until after issuance will not merely delay these efforts "by a few weeks." Opp. at 7. Rather, it will create broader inefficiencies that will affect implementation of the TMDL and may, in fact, require its subsequent revision, *see* Opalski Dec. ¶¶ 12, 14-16 – which would in turn delay, rather than advance, efforts to address environmental harm. Accordingly, Plaintiffs are incorrect that denying EPA's Motion for a stay favors faster amelioration of high water temperatures and are therefore incorrect that the harms and equities here weigh against a stay.

WHEREFORE, the United States respectfully requests that the Court grant its Motion for Stay Pending Appeal, ECF No. 47, and stay the Court's October 17, 2018 Order pending appeal.

DATED: November 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2018, I filed the foregoing United States' Reply in Support of Motion for Stay Pending Appeal with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/ Chloe H. Kolman

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